

1 THE HONORABLE RICHARD A. JONES  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 BLACK LIVES MATTER SEATTLE-  
11 KING COUNTY, ABIE EKENEZAR,  
12 SHARON SAKAMOTO, MURACO  
13 KYASHNA-TOCHA, ALEXANDER  
14 WOLDEAB, NATHALIE GRAHAM,  
15 AND ALEXANDRA CHEN,

Plaintiffs,

v.

CITY OF SEATTLE, SEATTLE POLICE  
DEPARTMENT,

Defendant.

No. 2:20-cv-00887RAJ

MOTION FOR TEMPORARY  
RESTRANING ORDER

NOTE ON MOTION CALENDAR:  
June 9, 2020

Oral Argument Requested

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MOTION FOR TEMPORARY  
RESTRANING ORDER (No. 2:20-cv-  
00887)

148463518.6

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## 1. INTRODUCTION

This is an action to defend the First and Fourth Amendment rights of peaceful protesters demonstrating against police brutality in Seattle. Irreparable harm will result without a temporary restraining order because the Defendants have shown they are incapable of voluntarily stopping the use of excessive force against protesters that has caused serious injury and risks more. The proven chilling effect of this threat of violence on First Amendment rights is presumed harmful, and the evidence submitted here meets the standard for temporary relief.

Since May 25, thousands of protesters have taken to the streets of Seattle—a classic public forum—to protest the gross, systemic injustices perpetrated by law enforcement against people of color generally and Black people specifically. On a nightly basis, these protests against police brutality have been met with police brutality. To control and suppress these demonstrations, the Seattle Police Department (“SPD”) has shot protesters with rubber bullets and sprayed them with mace. It has thrown flash-bangs (grenades by any other name) and canisters of chemical agents such as tear gas and pepper spray indiscriminately into crowds to disperse largely peaceful protesters. Despite a global pandemic, the City of Seattle (“City”) has authorized SPD to deploy weapons that cause respiratory distress and induce panic and fleeing, compressing already large crowds into smaller spaces, increasing the likelihood of spread of COVID-19. Rather than deescalate tensions and respond to the isolated instances in which protesters have threatened public safety with targeted and proportionate force, the Seattle Police Department (“SPD”) has used overwhelming and unconstitutional force to disperse peaceful protesters, journalists, and even medical personnel, and the evidence shows a TRO is necessary.

The purpose and effect of this excessive force has been to restrict, frustrate, and deter protesters from exercising their rights under the First and Fourth Amendment to the Constitution: the rights to peaceful assembly, petition for redress of grievances, freedom of speech, freedom of the press, and freedom from excessive force. Even the threat or prospect of the use of chemical agents and other less lethal weapons has the effect of chilling protest. In effect, the response by

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1 the City to these protests has been to curtail the right to protest in the first place. That is  
 2 unconstitutional and the reason Plaintiffs now seek a temporary restraining order (“TRO”) to  
 3 enjoin the City from further use of weapons such as pepper spray, tear gas, blast balls, and flash-  
 4 bang grenades against peaceful protesters.

5 The Court should grant this motion for three reasons. *First*, Plaintiffs are likely to  
 6 succeed on the merits of their First and Fourth Amendment claims. The City’s authorization of  
 7 the use of less-lethal weapons to control and suppress chills Plaintiffs’ right to free speech  
 8 constitutes retaliation in violation of the First Amendment. The United States Supreme Court  
 9 has upheld preliminary injunctions based on the First Amendment where police action chills  
 10 people from exercising their First Amendment rights.

11 The City’s policies and practices have been overbroad and underinclusive: rather than  
 12 focus on arresting, the SPD has hurled blast balls and canisters of tear gas and pepper spray at  
 13 entire crowds of peaceful protesters. A few days ago, 26 elected officials urged Seattle Mayor  
 14 Jenny Durkan and SPD Chief Carmen Best “to end the damage that SPD has caused by  
 15 overreaction to mostly peaceful protests,” highlighting that “[i]t is well documented that peaceful  
 16 protests are being targeted by law enforcement and turned into violent conflict.”<sup>1</sup>

17 The City’s actions also violate the Fourth Amendment prohibition on excessive force,  
 18 and the First Amendment rights at stake strengthen that claim. The City’s authorization of the  
 19 use of less-lethal weapons against protestors as a means of “crowd control,” absent any imminent  
 20 and specific threat to public safety, is inherently excessive, and violates the Fourth Amendment.  
 21 The City’s own leaders—including the Mayor and most of the City Council—have  
 22 acknowledged that the SPD’s response to these protests have been disproportionate and  
 23 improper; but those condemnations have not stopped SPD from continuing these unconstitutional  
 24 tactics. The City’s own Civil Rights Director recently stated that City employees fear for their  
 25 own public safety—not because of protesters, but because of their own police force. The Office  
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<sup>1</sup> Declaration of David A. Perez (“Perez Decl.”), Ex. 2 (6/7/2020 Letter).

1 of the Federal Public Defender for the Western District of Washington recently urged SPD “to  
 2 stop using brutal tactics on peaceful protesters—including tear gas, flash-bang grenades, pepper  
 3 spray, rubber bullets, tasers, and batons.”<sup>2</sup>

4 **Second**, Plaintiffs are likely to suffer irreparable harm if an injunction does not issue. It  
 5 is well-established that the loss of constitutional rights qualifies as irreparable harm, particularly  
 6 where the First Amendment is concerned. As Plaintiffs’ testimonial and video evidence  
 7 confirms, the SPD’s actions have the effect of blocking demonstrators from fully exercising their  
 8 First Amendment rights. The accompanying declarations demonstrate that the City’s actions  
 9 chill Plaintiffs’ prospective exercise of their rights.

10 These tactics also cause irreparable harm under the Fourth Amendment. On June 5, the  
 11 City announced that it would “temporarily” stop using tear gas. By then, the City had  
 12 replenished its stock of pepper spray and flash bangs, which it had been running low on, so the  
 13 SPD was able to resume deploying pepper spray canisters, which had a similar effect of  
 14 indiscriminately gassing peaceful protesters. The tear gas ban was short-lived: in the early  
 15 morning hours of June 8, SPD deployed an arsenal of tear gas against protestors so thick, the gas  
 16 shrouded dozens of SPD officers on bicycles riding down the once-filled street. Night after  
 17 night, peaceful protesters have been met with violence and disproportionate force in violation of  
 18 the First and Fourth Amendments, with no end in sight.

19 **Third**, the balance of equities and public interest tilt sharply in favor of Plaintiffs because  
 20 this balance must always be struck in favor of preventing a violation of constitutional rights,  
 21 especially where the challenged action harms not just the Plaintiffs but many similarly situated  
 22 people seeking to exercise their First Amendment rights. Rather than develop a narrowly  
 23 tailored policy to deal with the relatively few disruptive protesters, the City has chosen an  
 24 overbroad and underinclusive one: punish all protesters with blast balls, tear gas, pepper spray,  
 25 rubber bullets, and other force, rather than specifically deal with any individual protesters who

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26 <sup>2</sup> Statement by the Office of the Federal Public Defender (June 8, 2020), <https://wawfd.org/>.

1 allegedly caused damage. Whatever interest the City might have in crowd control does not and  
 2 cannot justify continuing to deploy less-lethal weapons against gassing peaceful protesters.  
 3 Moreover, an injunction is in the public interest because public health officials have made clear  
 4 that the use of chemical agents—such as tear gas and pepper spray—poses a significant risk of  
 5 spreading COVID-19.

6 Because the City has and continues to pursue a policy of excessive force against peaceful  
 7 protesters in violation of their First and Fourth Amendment rights, Plaintiffs request that the  
 8 Court issue an order enjoining the indiscriminate use of less-lethal on peaceful demonstrators.<sup>3</sup>

## 9 II. BACKGROUND

10 On Monday, May 25, 2020, George Floyd was murdered in Minneapolis, Minnesota.  
 11 Mr. Floyd, a Black man, was accused of a non-violent offense and arrested by Officer Derek  
 12 Chauvin, a white officer of the Minneapolis Police Department (“MPD”), and three other  
 13 officers. Officer Chauvin pressed his knee—and the full weight of his body—into Mr. Floyd’s  
 14 neck as Mr. Floyd lay pinned to the ground for eight minutes and 46 seconds. Mr. Floyd  
 15 struggled to breathe and pleaded for both mercy and his mother. Rather than allow Mr. Floyd to  
 16 breathe, other officers held his legs or stood by, watching as Mr. Floyd began to die. Among Mr.  
 17 Floyd’s last words were, “please, please, please, I can’t breathe.” During the last two minutes  
 18 and 53 seconds, Mr. Floyd was non-responsive. Mr. Floyd died at the scene, a victim of  
 19 excessive use of force. But Mr. Floyd was not the first victim of such force, nor, unfortunately,  
 20 will he be the last. The words “I can’t breathe” have been heard before in a similar context and  
 21 have become a rallying cry for those seeking racial justice and an end to discriminatory and  
 22 unconstitutional police practices.<sup>4</sup>

23

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24 <sup>3</sup> Plaintiffs conferred over the phone with counsel for the City and informed them that they would be  
 25 requesting the relief sought. Perez Decl. ¶ 2. The City did not indicate whether they oppose the relief sought herein,  
 but Plaintiffs assume that the City opposes such relief.

26 <sup>4</sup> See generally Frances Robles, Audra D.S. Burch, and Matt Furber, *What happened before George Floyd died*, N.Y. Times (May 29, 2020, 7:58 PM, updated May 30, 2020, 6:40 PM), <https://www.seattletimes.com/nation-world/what-happened-before-george-floyd-died/>.

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1       After George Floyd's murder, demonstrators gathered around the Seattle area on a daily  
 2 basis to protest police brutality. These protesters have been overwhelmingly peaceful but have  
 3 been met with overwhelming police brutality.

4       On May 29, the first day of protests in Seattle, SPD officers in riot gear responded to  
 5 protests by deploying pepper spray and flash bang grenades to disperse the crowd and sow panic  
 6 and disorder among the protesters.<sup>5</sup> Video surfaced of an SPD officer punching a man being  
 7 held to the ground.<sup>6</sup>

8       On May 30, SPD officers continued using chemical irritants and flash-bang grenades on  
 9 protesters and engaged in other violent tactics, including pepper-spraying a young girl<sup>7</sup> and  
 10 randomly throwing a flash-bang grenade or tear gas into the crowd.<sup>8</sup> Protestors in downtown  
 11 Seattle were hit with pepper spray, flash-bang grenades, and tear gas without warning, let alone  
 12 an order from SPD to move or disperse.<sup>9</sup> *See e.g.*, Declaration of Alexandra Chen ("Chen  
 13 Decl.") ¶¶ 4-5; Declaration of Nathalie Graham ("Graham Decl.") ¶ 3 ("They deployed tear gas,  
 14 which filled the street like plumes of smoke ... Its effects were so powerful, so painful, and so  
 15 alarming that I was physically unable to remain in the intersection. As a result, I was unable to  
 16 continue reporting on that incident."). That afternoon, Plaintiff Alex Woldeab and his partner  
 17 attended a peaceful protest at Westlake Park. Declaration of Alex Woldeab ("Woldeab Decl.")  
 18 ¶ 3. Around 3:45 p.m., he heard loud explosions that sounded like SPD deploying flash-bang  
 19 grenades. He and his partner moved to a crowd gathering at 5th and Pine with their hands up  
 20 chanting "hands up, don't shoot." *Id.* SPD shot tear gas near where Mr. Woldeab and his

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<sup>5</sup> Evan Bush, Amanda Snyder, and Elise Takahama, *Sparked by death of George Floyd, Seattle protesters*  
 22 *clash with police*, Seattle Times (May 29, 2020, 9:09 PM, updated May 30, 2020, 6:40 PM),  
 23 <https://www.seattletimes.com/seattle-news/protesters-break-windows-clash-with-police-in-downtown-seattle/>.

24       <sup>6</sup> *Seattle Protest Updates: The city reacts to the death of George Floyd*, Seattle Times (May 30, 2020,  
 25 10:38 AM, updated May 31, 2020, 1:26 AM), <https://www.seattletimes.com/seattle-news/protest-updates-as-the-country-reacts-to-the-death-of-george-floyd-follow-the-latest-developments-in-seattle-and-elsewhere/>.

26       <sup>7</sup> Declaration of Abie Ekenezar ("Ekenezar Decl.") ¶ 11.

27       <sup>8</sup> *Seattle mayor, police face questions over response to George Floyd protests, downtown turmoil*, Seattle  
 28 Times (May 31, 2020, 9:00 PM, updated June 1, 2020, 10:40 AM), <https://www.seattletimes.com/seattle-news/politics/seattle-mayor-police-face-questions-over-response-to-george-floyd-protests-downtown-turmoil/>.

29       <sup>9</sup> *Id.*

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1 partner stood, anyway. He and his partner felt the effects of tear gas immediately, burning eyes  
 2 and difficulty breathing. They immediately left the protest.

3 Near 5th Avenue and Cherry, Alexandra Chen was marching with a friend, when SPD,  
 4 without warning, fired flash-bang grenades into the crowd. The gas came next. It got caught in  
 5 her eyes, and under the mask she wore to protect herself from COVID-19. Ms. Chen lost sight  
 6 of her friend, who had been hit by shrapnel. After that, they left the protest. Chen Decl. ¶¶ 5-12.

7 Close by on East Pine, Nathalie Graham (a journalist) saw a truck playing music with  
 8 protestors dancing around it. It was a joyful scene until SPD “threw a flash bang grenade into  
 9 the crowd without warning. They deployed tear gas seconds later.” Graham Decl. ¶¶ 6-7. At  
 10 this point she decided to leave the protest because she feared for her safety. *Id.* ¶ 9.

11 The violence by SPD continued as the weekend wore on. On Sunday, May 31, Seattle  
 12 Police Chief Carmen Best also expressly authorized the use of tear gas on protestors.<sup>10</sup> That day,  
 13 the SPD again deployed flash-bang grenades, pepper spray, and blast balls against protesters and  
 14 militarized the streets of downtown Seattle despite mostly peaceful protests.<sup>11</sup>

15 In response to police brutality during the first weekend of protests (May 29-31), the  
 16 Seattle Office of Police Accountability received about 12,000 individual complaints of abusive  
 17 conduct by SPD, including SPD officers placing a knee on the neck area of two arrested people,  
 18

21  
 22  
 23 <sup>10</sup> [https://spdblotter.seattle.gov/wp-content/uploads/2020/06/4860\\_001.pdf](https://spdblotter.seattle.gov/wp-content/uploads/2020/06/4860_001.pdf)  
 24 <sup>11</sup> Lynda V. Mapes, *Seattle demonstrations vent anguish at death of George Floyd and more, for a*  
 25 *‘grieving nation,’* Seattle Times (May 31, 2020, 8:54 PM, updated June 1, 2020, 6:28 AM),  
 26 <https://www.seattletimes.com/seattle-news/seattle-demonstrations-vent-anguish-at-death-of-george-floyd-and-more-for-a-grieving-nation/> (“There were a couple of tense moments, with police setting off flash bangs and pepper spray on Fourth Avenue, but the protests were mostly peaceful as of Sunday evening”); *see also Seattle area protest updates: City reacts to George Floyd killing, Bellevue imposes curfew amid protests*, Seattle Times (May 31, 2020, 11:03 AM, updated May 31, 2020, 11:28 PM), <https://www.seattletimes.com/seattle-news/seattle-protest-updates-on-day-2-of-curfew-the-city-reacts-to-the-death-of-george-floyd/>.

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1 SPD officers covering badge numbers, and SPD Officers failing to record activity on their body  
 2 cameras.<sup>12</sup> For all of 2019, the Office of Police Accountability received just 928 complaints.<sup>13</sup>

3 On June 1, SPD unleashed tear gas on peaceful protesters chanting on Capitol Hill after  
 4 SPD officers escalated the confrontation. Video from the front line of the Capitol Hill protest  
 5 shows largely peaceful crowds exercising their First Amendment rights. Converge,  
 6 (@WWConverge), Tweet (June 1, 2020 11:06 PM)

7 <https://twitter.com/WWConverge/status/1267699185479938049> (“Pink Umbrella Video”); *see*  
 8 *also* Declaration of Omari Salisbury (“Salisbury Decl.”) ¶ 3 (link to June 1 video).<sup>14</sup> These  
 9 peaceful protesters were behind a police barricade, one casually speaking with police officers on  
 10 the other side of the barricade, another trying to de-escalate the situation. *Id.* Yet they were hit  
 11 with pepper spray, flash-bang grenades, and later tear gas and blast balls without provocation.  
 12 *Id.*; Declaration of Muraco Kyashna-tochá (“Kyashna-tochá Decl.”) ¶¶ 3-6. The first escalation  
 13 was the pepper spray. And it all started when an SPD officer tried to pull away a protestor’s pink  
 14 umbrella. Pink Umbrella Video; Salisbury Decl. ¶ 3 (June 1 video). There was no warning  
 15 before the SPD officer hit protestors with pepper spray, nor were there any audible warnings  
 16 from the video about what came next. Salisbury Decl. ¶ 3 (June 1 video). One video shows an  
 17 officer, behind the front lines, holding a spray can above his head and spraying gas into the  
 18 crowd and hitting protestors well behind the front line. *Id.* at 0:33. This led many more officers  
 19  
 20

21 <sup>12</sup> Office of Police Accountability processing 12,000 complaints after weekend demonstrations (June 1,  
 22 2020), [https://www.seattle.gov/Documents/Departments/OPA/PressReleases/06-01-20\\_OPA-Press-Release-Following-Demonstrations.pdf](https://www.seattle.gov/Documents/Departments/OPA/PressReleases/06-01-20_OPA-Press-Release-Following-Demonstrations.pdf); *Seattle-area protests: Police declare a riot as demonstrators gather for fourth day to call for police accountability*, Seattle Times (June 1, 2020, 2:38 PM, updated June 3, 2020, 6:34 AM), <https://www.seattletimes.com/seattle-news/george-floyd-protests-continue-in-seattle-area-demonstrators-expected-to-gather-for-fourth-day-to-call-for-racial-justice/>.

23 <sup>13</sup> Office of Police Accountability 2019 Annual Report (April 2020),  
 24 <https://www.seattle.gov/Documents/Departments/OPA/Reports/2019-Annual-Report.pdf>.

25 <sup>14</sup> *Seattle-area protests: Police declare a riot as demonstrators gather for fourth day to call for police accountability* (June 1, 2020, 2:38 PM, updated June 3, 2020, 6:34 AM), <https://www.seattletimes.com/seattle-news/george-floyd-protests-continue-in-seattle-area-demonstrators-expected-to-gather-for-fourth-day-to-call-for-racial-justice/>.

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1 to begin spraying gas into the crowd. *Id.* at 0:37-0:43. The crowd began to disperse.<sup>15</sup> The  
 2 Moment Video 0:34. Then, without warning, came the flash-bang grenades. *Id.* at 0:35.  
 3 Officers fired over a dozen flash-bang grenades into the dispersing crowd, trapping some  
 4 protestors, and continuing to fire after the crowd left the barricade, *Id.* at 0:35 to 0:55. Many  
 5 remaining protestors had their hands in the air. Pink Umbrella Video at 1:12-1:28. Then came  
 6 the tear gas canisters, fired into a quickly emptying intersection. The Moment Video 0:55-1:51.

7 Plaintiff Muraco Kyashna-tochá was at the Capitol Hill barricade that evening, protesting  
 8 peacefully. In fact, she appears in the June 1, 2020 video in the Salisbury Declaration. Without  
 9 provocation, SPD officers began pepper spraying her and others at the barricade. “There was  
 10 pepper spray on the whole right side of my body, my eye, my ear, my hair, and my mask. It took  
 11 almost a minute for the pain to take effect. After a minute I could no longer see clearly. But I  
 12 knew the police threw flash bangs grenades—because I could hear their loud bangs and see the  
 13 bright flashes of light.” Kyashna-tochá Decl. ¶ 5. A two-hour shower after the incident wasn’t  
 14 enough to stop her body from burning. Ms. Kyashna-tochá never heard the SPD issue any  
 15 warnings that they were about to use pepper spray, or worse, against the protestors. But if SPD  
 16 had issued such warnings, she would have moved back “at least half a block away” to avoid  
 17 confrontation. *Id.* ¶¶ 3-10.

18 Mr. Woldeab and his partner were also injured by SPD’s use of force on June 1 in Capitol  
 19 Hill. Woldeab Decl. ¶ 7. As they turned the corner onto E Pike St and 11th Ave Mr. Woldeab  
 20 and his partner were immediately hit with flash-bang grenades and tear gas. *Id.* ¶ 6. They had  
 21 no warning. *Id.* Mr. Woldeab’s partner stumbled, choking on the fumes, and was temporarily  
 22 blinded. *Id.* ¶ 7. The gas blinded and suffocated Mr. Woldeab too. *Id.* Finally, they reached a

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23 <sup>15</sup> SEATECD, *This is the moment it all happened*, Reddit (June 1, 2020, 9:50 p.m.),  
 24 [https://www.reddit.com/r/Seattle/comments/gv0ru3/this\\_is\\_the\\_moment\\_it\\_all\\_happened/?utm\\_content=title&utm\\_medium=post\\_embed&utm\\_name=c73602c64f0943ab8ca74390668acd85&utm\\_source=embedly&utm\\_term=gv0ru3](https://www.reddit.com/r/Seattle/comments/gv0ru3/this_is_the_moment_it_all_happened/?utm_content=title&utm_medium=post_embed&utm_name=c73602c64f0943ab8ca74390668acd85&utm_source=embedly&utm_term=gv0ru3) (“The Moment Video”); see also *Seattle-area protests: Police declare a riot as demonstrators gather for fourth day to call for police accountability* (June 1, 2020, 2:38 PM, updated June 3, 2020, 6:34 AM),  
 25 <https://www.seattletimes.com/seattle-news/george-floyd-protests-continue-in-seattle-area-demonstrators-expected-to-gather-for-fourth-day-to-call-for-racial-justice/>.

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1 volunteer, civilian medic who doused water and milk in their eyes to relieve the pain. *Id.* The  
 2 couple did not return to the protests that night.<sup>16</sup> *Id.*

3 The SPD's use of these chemical agents in the middle of a global health crisis is even  
 4 more troubling because they increase the potential for COVID-19 to spread in the community.

5 See Declaration of William Daniell ("Daniell Decl.") ¶¶ 53-54, 57. The SPD declared the June 1  
 6 incident a "riot,"<sup>17</sup> but videos of the protest make clear that SPD—not the protesters—instigated  
 7 any riot that occurred. Salisbury Decl. ¶ 3. (Video of June 1 protest).

8 On Tuesday, June 2, SPD again deployed tear gas, pepper spray, blast balls, flash-bang  
 9 grenades, and rubber bullets, causing protesters to flee in fear.<sup>18</sup> See Salisbury Decl. ¶ 3 (June 2  
 10 video 1:19-5:11). SPD even employed this means as protestors retreated with their hands up. *Id.*  
 11 But the vast majority of protestors at 11th and Pine that night had been peaceful. Graham Decl.,  
 12 ¶¶ 10-11. This conduct aligns with what a Washington state Trooper told his team working  
 13 alongside SPD to not "kill" protestors, but to "hit them hard."<sup>19</sup>

14 By Friday, June 5, SPD had gotten so out of control that Mariko Lockhart, the City's own  
 15 Director of the Office for Civil Rights, wrote an open letter in which she denounced SPD's  
 16 excessive response, expressly noting that she had "heard from other City leadership and

18 \_\_\_\_\_  
 19 <sup>16</sup> Mr. Woldeab can't sleep at night because of his encounters with SPD. He incessantly checks social media to ensure his friends are safe. "I know that when I attend a protest where the Seattle Police Department is present I will never be safe." He feels the same for those he holds dear. Woldeab Decl. ¶ 11.

20 <sup>17</sup> *Seattle area protests: Police declare a riot as demonstrators gather for fourth day to call for police accountability*, Seattle Times (June 1, 2020, 2:38 PM, updated June 3, 2020, 6:34 AM), <https://www.seattletimes.com/seattle-news/george-floyd-protests-continue-in-seattle-area-demonstrators-expected-to-gather-for-fourth-day-to-call-for-racial-justice/> ("videos of the officers spraying the crowd and deploying flash bangs quickly spread on social media Monday night; many of those who shared them said the footage showed the police were escalating the confrontation.").

23 <sup>18</sup> *Seattle-area protests: Demonstrators gather for fifth day to call for peace and change after George Floyd's death*, Seattle Times (June 2, 2020, 3:19 PM, updated June 3, 2020, 2:20 PM), <https://www.seattletimes.com/seattle-news/seattle-area-protests-demonstrators-expected-to-gather-for-fifth-day-to-call-for-peace-and-change-after-george-floyds-death/>.

25 <sup>19</sup> Jim Brunner and Christine Clarridge, *Washington State Patrol apologizes for officer's 'Don't kill them, but hit them hard' instruction regarding Seattle protesters*, Seattle Times (June 3, 2020, 8:40 AM, updated June 3, 2020, 5:30 PM), <https://www.seattletimes.com/seattle-news/washington-state-patrol-apologizes-after-officer-tells-his-team-dont-kill-them-but-hit-them-hard-in-reference-to-seattle-protesters/> (with embedded video).

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1 employees that they fear for their personal safety, not because of other protestors but because of  
 2 the police.” Perez Decl., Ex. 1.<sup>20</sup>

3 The City then announced a temporary halt to tear gas for 30 days.<sup>21</sup> The City made clear  
 4 that this “temporary ban only applies to tear gas — not flash bang grenades, pepper spray and  
 5 other crowd-control tools and tactics.”<sup>22</sup> And it left open the possibility that members of SPD’s  
 6 SWAT team could still deploy tear gas on protesters.

7 The next night, June 6, SPD again responded to peaceful protests by unleashing violence  
 8 to disperse protesters, including by throwing blast balls, flash-bang grenades, and canisters of  
 9 pepper spray at the crowd.<sup>23</sup>

10 Videos of the June 6 incident show that the police began throwing blast balls and  
 11 shooting gas into the packed crowd not because of any imminent threat to public or officer  
 12 safety, but because they wanted a large, densely packed crowd to quickly and collectively move  
 13 back five feet. The Love Bar (@lovebarofficial), Tweet (June 6, 2020, 8:09 p.m.),  
 14 <https://twitter.com/lovebarofficial/status/1269466387182841857?s=20>; *see also* Salisbury Decl.  
 15 ¶ 3.<sup>24</sup> Then, at least two SPD officers started spraying the protesters, with one officer spraying  
 16 into a group of protesters even as protesters were moving away from the barricade. *Id.* 0:43-  
 17 0:45. SPD officers began forcefully moving protesters backward. *Id.* 0:55-1:10. Then again, as  
 18

19 <sup>20</sup> *See also Chief Best orders temporary ban on tear gas during protests on 8th day of action in Seattle area*  
 20 *after George Floyd’s killing*, Seattle Times (June 5, 2020, 6:34 AM, updated June 6, 2020, 6:20 AM),  
<https://www.seattletimes.com/seattle-news/seattle-area-protests-demonstrators-plan-eighth-day-of-action-after-george-floyds-killing/>.

21 <sup>21</sup> *Id.*

22 <sup>22</sup> *See Lewis Kamb & Daniel Beekman, Seattle mayor, police chief agree to ban use of tear gas on*  
 23 *protesters amid ongoing demonstrations*, Seattle Times (June 5, 2020, 1:06 PM, updated June 6, 2020, 6:28 AM),  
<https://www.seattletimes.com/seattle-news/watchdog-groups-to-seattles-mayor-and-police-chief-spd-should-stop-using-tear-gas-on-demonstrators/>.

23 <sup>23</sup> *Seattle police use blast balls, pepper spray to try to disperse Saturday protesters*, Seattle Times (June 6, 2020, 8:18 AM, updated June 7, 2020, 2:26 AM), <https://www.seattletimes.com/seattle-news/seattle-area-protests-demonstrators-prepare-for-ninth-day-of-action-after-george-floyds-killing/>.

24 <sup>24</sup> Chase Burns & Rich Smith, *SPD Disperses Crowd with Blast Balls, “Chemical Agents,” on Eighth Day of Protests Against Police Brutality*, The Stranger (June 7, 2020, 1:13 AM),  
<https://www.thestranger.com/slog/2020/06/06/43857405/spd-disperses-crowd-with-blast-balls-chemical-agents-pepper-spray-on-eighth-day-of-protests-against-police-brutality>.

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1 occurred only a few days prior, SPD officers began using pepper spray and blast bombs without  
 2 warning against the protesters as they moved backwards, away from the officers. *Id.* 1:11-1:27.  
 3 Setting aside the logistical impossibility of having a large crowd move back together five feet,  
 4 the protesters' overall delay or reluctance in moving back did not justify the gratuitous and  
 5 excessive force that the police employed. The police faced no threat of physical harm to  
 6 themselves or others, and there was no threat of property damage either.

7 On June 7, Chief Best did not disavow the extreme police violence of June 6, responding  
 8 only that SPD would be considering changes to its "footprint," "format," and "posture" of  
 9 "police out here on the scene." Press Conference with SPD Chief Carmen Best at 1:06, June 7,  
 10 2020, <https://www.facebook.com/Q13FOX/videos/252009629404175/>.

11 Later that day, over two dozen leaders signed an open letter condemning "the police  
 12 tactics used in daily protests," and made clear they are "concerned that the response of the  
 13 Seattle Police Department (SPD) is escalating the conflict in the streets of Seattle, particularly in  
 14 Capitol Hill and in communities of color, with their inappropriate use of force." Perez Decl., Ex.  
 15 2 (June 7 Letter from City, County, and State Officials); *see also* Perez Decl., Ex. 3 (June 8  
 16 Letter from elected officials of color representing City of Seattle).

17 This letter urges the City "to change [its] tactics" and "to end the damage that SPD has  
 18 caused by overreaction to mostly peaceful protests" and makes clear that "continued violence by  
 19 the police will only polarize this necessary conversation in unproductive ways." The letter goes  
 20 on to make the following observations about the harmful effects of SPD's use of force against  
 21 protesters:

22 This harms the relationship between law enforcement and the  
 23 community, harms our city, and harms law enforcement officers  
 24 and their families in the form of emotional trauma. Physical  
 25 violence is being perpetrated against members of our community  
 26 by SPD. Emotional trauma and extraordinary racial aggression is  
 being inflicted. Constitutional rights are at risk. Police tactics are  
 exacerbating health risks amidst a devastating respiratory  
 pandemic. The public health crisis of law enforcement anti-black

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1 violence is so extreme as to have eclipsed the previous disease that  
 2 gripped our city . . .

3 Deploying police in riot gear to form a wall of officers positioned  
 4 against peaceful protesters is not conducive to de-escalation and  
 5 healing; a moratorium on tear gas that is then replaced with pepper  
 6 spray is not de-escalation.

7 Perez Decl., Ex. 2; *see also id.*, Ex. 3 (“[L]aw enforcement’s response to people exercising their  
 8 First Amendment right to freedom of speech and demonstration must shift right now”).

9 None of it mattered: in the early morning hours of June 8, a day before filing this action,  
 10 and two days after the Mayor Durkan and Chief Best announced the “ban” on tear gas, SPD used  
 11 what appeared to be such large quantities of tear gas on protestors that it engulfed the *entire city*  
 12 *block*.<sup>25</sup> More demonstrations are scheduled in Seattle today and in the coming days, including a  
 13 statewide walkout and march being promoted by Plaintiff Black Lives Matter Seattle-King  
 14 County, among others, scheduled for Friday, June 12. The City has made no credible efforts to  
 15 restrict SPD’s ability to deploy excessive force.

### 16 III. ARGUMENT

#### 17 A. Standard for Granting Temporary Relief

18 The standard for issuing a temporary restraining order is “substantially identical” to the  
 19 standard for issuing a preliminary injunction. *Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.*,  
 2001 F.3d 832, 839 n.7 (9th Cir. 2001).

21 Plaintiffs who seek a TRO or preliminary injunction must show: (1) that Plaintiffs are  
 22 “likely to succeed on the merits,” (2) that Plaintiffs are “likely to suffer irreparable harm in the  
 23 absence of preliminary relief,” (3) “that the balance of equities tips in [Plaintiffs’] favor,” and 4)  
 24 “that an injunction is in the public interest.” *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d

25 See Salisbury Decl. ¶ 6 (June 7 video, starting at 1:29:00); Seattle Police Department, TWITTER (June 7, 2020, 12:18 a.m.), <https://twitter.com/SeattlePD/status/1269891637448019968>; Jemima McEvoy, Seattle Police Use Tear Gas Against Protestors Despite City Ban, Forbes (June 8, 2020, 10:54 AM), <https://www.forbes.com/sites/jemimamcevoy/2020/06/08/seattle-police-use-tear-gas-against-protestors-despite-city-ban/#791c43415b4b>.

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1281, 1289 (9th Cir. 2013) (alteration in original) (quoting *Winter*, 555 U.S. at 20). Although not  
 2 dispositive by itself, the first of these factors—likelihood of success on the merits—is the “most  
 3 important.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc). However,  
 4 “[h]ow strong a claim on the merits is enough depends on the balance of harms: the more net  
 5 harm an injunction can prevent, the weaker the plaintiff’s claim on the merits can be while still  
 6 supporting some preliminary relief.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1133  
 7 (9th Cir. 2011) (quoting *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*,  
 8 582 F.3d 721, 725 (7th Cir. 2009)). Thus, while Plaintiff’s claims on the merits are extremely  
 9 strong, temporary relief would be appropriate even if they were less clearly meritorious given  
 10 how sharply the balance of harms tips in Plaintiffs’ favor. *See Shell Offshore*, 709 F.3d at 1291.

11 **B. Plaintiffs Are Likely to Succeed on the Merits Because the City’s Use of Force Is  
 12 Unconstitutional.**

13 **1. The City’s Actions Violate the First Amendment**

14 The First Amendment reflects a “profound national commitment” to the principle that  
 15 “debate on public issues should be uninhibited, robust, and wide-open.” *N. Y. Times Co. v.*  
 16 *Sullivan*, 376 U.S. 254, 270 (1964). The Supreme Court has consistently commented on the  
 17 central importance of protecting speech on public issues. *See, e.g., Connick v. Myers*, 461 U.S.  
 18 138, 145 (1983); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). To prove a  
 19 First Amendment retaliation, Plaintiffs must show: (1) they “engaged in a constitutionally  
 20 protected activity, (2) the defendant’s actions would chill a person of ordinary firmness from  
 21 continuing to engage in the protected activity and (3) the protected activity was a substantial or  
 22 motivating factor in the defendant’s conduct.” *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755,  
 23 770 (9th Cir. 2006); *see also Skoog v. Cty. of Clackamas*, 469 F.3d 1221, 1232 (9th Cir. 2006).  
 24 The United States Supreme Court has upheld preliminary injunctions based on the First  
 25 Amendment where police action “chill[s] the willingness of people to exercise their First  
 26 Amendment rights.” *Allee v. Medrano*, 416 U.S. 802, 810 (1974).

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1       There is no question that taking to the streets to protest police brutality is at the core of  
 2 what the First Amendment was designed to protect. Activities such as demonstrations, protest  
 3 marches, and picketing are clearly protected by the First Amendment. *Edwards v. South*  
 4 *Carolina*, 372 U.S. 229 (1963); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *NAACP W. Region v.*  
 5 *City of Richmond*, 743 F.2d 1346 (9th Cir. 1984). The traditional public forum consists of  
 6 streets, sidewalks, and parks—places that have “immemorially been held in trust for use of the  
 7 public . . . for purposes of assembly, communicating thoughts between citizens, and discussing  
 8 public questions.” *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939); *accord United*  
 9 *States v. Grace*, 461 U.S. 171, 177 (1983); *Gaudiya Vaishnava Soc'y v. City and Cty. of S. F.*,  
 10 952 F.2d 1059, 1065 (9th Cir. 1990). Moreover, “[t]here is a strong First Amendment interest in  
 11 protecting the right of citizens to gather in traditional public forum locations that are critical to  
 12 the content of their message, just as there is a strong interest in protecting speakers seeking to  
 13 reach a particular audience.” *Galvin v. Hay*, 374 F.3d 739, 752 (9th Cir. 2004) (holding dispersal  
 14 of protected First Amendment assembly unconstitutional even though it violated location  
 15 restriction). Seattle protestors have chosen to protest near the police precinct on Capitol Hill as a  
 16 part of their message against police brutality.

17       Criticism of the government is no less protected when it is angry or even inflammatory.  
 18 *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (Free speech “may indeed best serve its high  
 19 purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are,  
 20 or even stirs people to anger.”).

21       The City’s deployment of less-lethal weapons as means of crowd control has trampled  
 22 upon Plaintiffs’ First Amendment rights. Night after night since May 29, thousands of  
 23 demonstrators have taken the streets of Seattle to protest against racial injustice and police  
 24 brutality. They have been met with a level of force unprecedented in our City’s history sufficient  
 25 to deter a person of ordinary firmness from exercising their First Amendment rights. In response  
 26 to alleged (but demonstrably isolated) incidents of protester misconduct, SPD has

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1 indiscriminately targeted entire crowds by hurling teargas canisters, pepper spray grenades, and  
 2 blast bombs. In doing so, SPD's express purpose has been to "disperse" the protest—i.e., to end  
 3 it. *Cf. Lacey v. Maricopa Cty.*, 693 F.3d 896, 917 (9th Cir. 2012) ("It is hard to conceive of a  
 4 more direct assault on the First Amendment than public officials ordering the immediate arrests  
 5 of their critics.").

6 In various videos submitted with this motion and with Plaintiffs' complaint, it is clear  
 7 that SPD begins to disperse crowds with disproportionate and excessive force. *See, e.g.*, Cole  
 8 Miller (KOMO News), Tweet (June 6, 2020 7:41 PM), <https://twitter.com/ColeMillerTV/status/1269459358288494592>; Kyashna-tochá Decl. ¶ 10; Graham Decl. ¶ 6; Chen Decl. ¶¶ 4-5;  
 9 Woldeab Decl. ¶¶ 7, 11. Blocking or dispersing a protest "before demonstrators have acted  
 10 illegally or before the demonstration poses a clear and present danger is presumptively a First  
 11 Amendment violation." *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996). (citing *Carroll*  
 12 *v. President & Comm'r of Princess Anne*, 393 U.S. 175, 180-81 (1968)).

14 In *Collins*, the Ninth Circuit rejected San Francisco's attempts to curtail protests—which,  
 15 like the protests here, were prompted by an incident of racial injustice—given the unique  
 16 protections afforded to such activity under the First Amendment:

17 Demonstrations can be expected when the government acts in  
 18 highly controversial ways, or other events occur that excite or  
 19 arouse the passions of the citizenry. The more controversial the  
 20 occurrence, the more likely people are to demonstrate. Some of  
 21 these demonstrations may become violent. The courts have held  
 22 that the proper response to potential and actual violence is for the  
 23 government to ensure an adequate police presence, and to arrest  
 24 those who actually engage in such conduct, rather than to suppress  
 25 legitimate First Amendment conduct as a prophylactic measure.

26 *Id.* at 1372 (citations omitted). Rather than "arrest those who actually engage" in violence, the  
 27 SPD has chosen to suppress the legitimate First Amendment rights of everyone at these protests.  
 28 That is not permitted under the First Amendment. *Id.* at 1373.

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1       Moreover, SPD's use of force furthers no policy objective. SPD's actions are both  
 2 grossly overbroad while simultaneously ineffective to achieve any legitimate aims. The vast  
 3 majority of protestors in the last 11 days have been peaceful. Naturally, SPD's use of force  
 4 against these peaceful protests targets all protesters indiscriminately, applying the same  
 5 excessive force to peaceful protestors and bystanders. *See* Kyashna-tochá Decl. ¶ 5 ("But  
 6 seemingly without any provocation, the police officers began pepper spraying me and other  
 7 protestors at the barricade."); Woldeab Decl. ¶ 4 ("We were not being violent to anyone, and we  
 8 were not destroying or threatening any property. But SPD still launched chemical agents at  
 9 us[.]"). But SPD's excessive force is also ineffective in that it is not targeted at apprehending  
 10 agitators and lawbreakers. If SPD's aim is to control the crowd and apprehend agitators, it  
 11 should do that. Launching incendiary grenades, firing rubber bullets, and gassing peaceful  
 12 protestors does no such thing.

13       Likewise, the second element of the claim is satisfied because there is no question the  
 14 evidence demonstrates that SPD's use of excessive force has chilled—and will continue to  
 15 chill—Plaintiffs from engaging in protected speech and from recording SPD's violations of their  
 16 First Amendment rights. The evidence shows police officers using explosive devices and  
 17 chemical agents against largely peaceful demonstrators to prevent those demonstrators from  
 18 exercising their First Amendment rights to speak and assemble. As the June 7, 2020, letter from  
 19 City, County, and State elected officials makes clear: "It is well documented that peaceful  
 20 protests are being targeted by law enforcement and turned into violent conflict." Perez Decl.,  
 21 Ex. 2.

22       Moreover, SPD appears to be using these explosive devices and chemical agents to  
 23 inspire fear and break up demonstrations, and it is working to deter protesters and chill the  
 24 exercise of First Amendment rights:

25       • "We were almost immediately met with flash bangs and tear gas without any warning. I  
 26            was stunned. . . ." Woldeab Decl. ¶¶ 6.

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- 1     • “If the police had announced they were going to pepper spray me I would have moved  
2         back at least half a block away. . . . I am afraid of being pepper sprayed by the police  
3         without notice again.” Kyashna-tochá Decl. ¶¶ 5, 9-12.
- 4     • “I did not participate in any protests between May 30 and June 6 in Seattle because I was  
5         too frightened by the violent police response to attend . . . . If the police stopped using  
6         blast balls, and indiscriminately using tear gas and pepper spray (and other chemical  
7         irritants), I would gladly join the protests and exercise my First Amendment right to  
8         assemble.” Sakamoto Decl. ¶¶ 4-6.

9             The evidence in the record also demonstrates Plaintiffs’ likelihood of success on the third  
10         element of Plaintiffs’ First Amendment claim—that the protected activity be a “substantial or  
11         motivating factor” in the use of force. The City has been explicit that SPD is authorized to use  
12         less-lethal weapons as a form of “crowd control” to control and suppress protests, rather than to  
13         address individual conduct that poses a threat to public safety. In addition, the unprecedented  
14         nature of the less-lethal force deployed on a regular basis by SPD since the killing of George  
15         Floyd is also highly suggestive of the fact that the protesters’ speech is that the protected activity  
16         be a substantial or motivating factor in SPD’s use of force. Broderick Decl. ¶¶ 6-8, 12;  
17         Kyashna-tochá Decl. ¶ 10. Although people gather to peacefully protest all the time in Seattle, it  
18         is only in response to demonstrations against police brutality that SPD has responded with an  
19         overwhelming deployment of less-lethal weapons.

20             The sheer amount of chemical agents that are being indiscriminately thrown at otherwise  
21         peaceful protests is objectively unreasonable, suggests that a substantial or motivating purpose of  
22         this use of force is to disperse the protesters exercising their First Amendment rights. In several  
23         videos taken early June 8 by a journalist, the street below is covered in plumes of gas and smoke.  
24         Broderick Decl. ¶ 12. According to the SPD’s own Tweet announcing the use of tear gas on  
25         June 8, the tear gas was used because a single person blocks away was rumored to have a gun.  
26         Seattle Police Department (@SeattlePD), Tweet (June 7, 2020, 12:18 a.m.),

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1 https://twitter.com/SeattlePD/status/1269891637448019968. Indiscriminately using force  
 2 against an entire crowd of peaceful protesters because of a report that one person had a gun is not  
 3 indicative of a targeted response to an individual posing a threat to public safety. The evidence  
 4 before the Court is more than enough to allow the Court to draw the inference that the real goal  
 5 of the SPD's use of less-lethal force was, and is, to stop protesters from protesting police  
 6 brutality.

7 Days before, on June 6, SPD justified its June 6 use of pepper spray, flash grenades, and  
 8 blast balls as a response to protesters throwing "improvised explosives." To support this claim,  
 9 SPD posted a picture of the so-called "improvised explosive," which was actually a shattered  
 10 prayer candle. *See* Seattle Police Department (@SeattlePD), Tweet (June 8, 2020, 12:18 AM),  
 11 https://twitter.com/SeattlePD/status/1269891637448019968.

12 On this record, the Court should grant a TRO. The Supreme Court has expressly held  
 13 that, "[w]here, as here, there is a persistent pattern of police misconduct, injunctive relief is  
 14 appropriate." *Allee*, 416 U.S. at 815. Accordingly, the Ninth Circuit has approved injunctive  
 15 relief where plaintiffs have alleged the existence of a pattern or practice of unlawful official  
 16 conduct. For example, in *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985), the Ninth Circuit  
 17 approved injunctive relief against warrantless government searches of farmworker housing  
 18 because "the district court . . . found that the defendants engaged in a standard pattern of  
 19 officially sanctioned police behavior." *Id.* at 1324; *accord Melendres v. Arpaio*, 695 F.3d 990,  
 20 998 (2012).

21 Plaintiffs have shown an ongoing pattern and practice of police use of SPD excessive  
 22 force that has been encouraged, tolerated, and ratified by the City. It shows no sign of abating,  
 23 even after an obviously-ineffectual claim to pause the use of tear gas. Plaintiffs have a real and  
 24 immediate fear of being again subjected to police use these weapons in circumstances that do not  
 25 call for such force and that deter and punish peaceful protesting and harm peaceful protesters. As  
 26

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1 long as the protests continue, this harmful and unconstitutional pattern will be repeated absent  
 2 this Court's intervention.

3 **2. The City's Actions Violate the Fourth Amendment**

4 The Fourth Amendment guarantees the right to be free from excessive force. Courts  
 5 analyze claims of excessive force under the Fourth Amendment's objective reasonableness  
 6 standard. *Graham v. Connor*, 490 U.S. 386, 395 (1989).

7 When the governmental interests at stake are substantial, a greater intrusion upon the  
 8 Fourth Amendment rights of the person may be justified. Conversely, when the governmental  
 9 interest is insubstantial, the application of even minimal force may be unreasonable. When  
 10 balancing the degree of force used against the governmental interests, "it is the *need* for force  
 11 which is at the heart of the *Graham* factors." *Liston v. Cty. of Riverside*, 120 F.3d 965, 976 (9th  
 12 Cir. 1997)) (emphasis in original) (citation omitted).

13 Applying these factors, the Ninth Circuit has held that "firing projectiles, including  
 14 pepperballs, in the direction of individuals suspected of, at most, minor crimes, who posed no  
 15 threat to the officers or others, and who engaged in only passive resistance," is unreasonable.  
 16 *Nelson v. City of Davis*, 685 F.3d 867, 880 (9th Cir. 2012) (citing *Deorle v. Rutherford*, 272 F.3d  
 17 1272, 1284-95 (9th Cir. 2001)). Likewise, the Ninth Circuit has "rejected the contention that the  
 18 use of pepper spray is a 'minimal' intrusion, due to the immediacy and 'uncontrollable nature' of  
 19 the pain involved." *Id.* at 878 (citations omitted); *see also Logan v. City of Pullman*, 392 F.  
 20 Supp. 2d 1246, 1261 (E.D. Wash. 2005). Thus, the Ninth Circuit has found that the use of  
 21 pepper spray to disperse protestors can constitute excessive force where it is "unnecessary to  
 22 subdue, remove, or arrest the protestors," even if protesters failed to heed a police warning.  
 23 *Young v. Cty. of L.A.*, 655 F.3d 1156, 1167 (9th Cir. 2011) (citation omitted).

24 The Ninth Circuit has also noted that where the individuals targeted by the police are  
 25 innocent or at least not engaged in "serious criminal behavior," that "significantly reduce[s] the  
 26 governmental interest involved." *Nelson* , 685 F.3d at 80. In *Nelson*, the Ninth Circuit found

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1 that “[a]lthough the officers encountered individuals at various points . . . who threw bottles or  
 2 other debris at them,” that did not justify the use of force against Plaintiff or others around him  
 3 when the officers “did not see anyone in [Plaintiff’s] group throwing bottles or engaging in any  
 4 other threatening or dangerous behavior.” *Id.* The Ninth Circuit held that even if the officers  
 5 had issued orders to disperse and the plaintiff did not comply immediately, the failure to comply  
 6 “could only rise to the level of passive resistance,” which the Ninth Circuit has held “neither  
 7 rises to the level of active resistance nor justifies the application of a non-trivial amount of  
 8 force.” *Id.* at 881; *see also Young*, 655 F.3d at 1165-66.

9       Here, videos of SPD’s conduct and eye-witness accounts reveal the unreasonableness of  
 10 the City’s conduct. The police in these videos are not responding to any immediate threat or  
 11 public safety need, but instead resorting to extreme tactics for no legitimate reason. Salisbury  
 12 Decl. ¶ 3 (2:40-4:40); Kyashna-tochá Decl. ¶¶ 5-7 (“[W]e were still non-violent and police  
 13 officers continued to avoid eye contact. I did not hear them issue any warnings, and they did not  
 14 have any masks. But seemingly without any provocation, the police officers began pepper  
 15 spraying me and other protestors at the barricade.”); Ekenezar Decl. ¶ 11 (recorded SPD gassing  
 16 a young girl on May 30 in downtown Seattle); *id.* ¶¶ 12-22 (I “was shocked” during SPD’s June  
 17 6 use of excessive force. “The light and sound emitted from weapons the SPD was using made  
 18 me feel like I was back in Afghanistan again.”).

19       Video evidence demonstrates that SPD responded with extreme tactics to situations that  
 20 undeniably did not warrant such force, including a dispute over a protestor’s umbrella, Salisbury  
 21 Decl. ¶ 3 (2:40-4:40), and protestors dancing around a truck, Graham Decl. ¶ 6. A law  
 22 enforcement officer working with SPD prepared his fellow officers by saying: “Don’t kill them,  
 23 but hit them hard.”<sup>26</sup>

24

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25       <sup>26</sup> Jim Brunner & Christine Clarridge, *Washington State Patrol apologizes for officer’s ‘Don’t kill them, but*  
 26 *hit them hard’ instruction regarding Seattle protesters*, Seattle Times (June 3, 2020, 8:40 AM, updated June 3,  
 his-team-dont-kill-them-but-hit-them-hard-in-reference-to-seattle-protesters/ (with embedded video).

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1       These weapons cause far greater harm and trauma than can be justified by the gravity of  
 2 any threat posed by individual demonstrators during recent protests. *See Young*, 655 F.3d at  
 3 1162; *see also* Facts About Riot Control Agents Interim Document, Centers for Disease Control  
 4 and Prevention, <https://emergency.cdc.gov/agent/riotcontrol/factsheet.asp>. In addition, the  
 5 pepper spray and tear gas are known to cause coughing and spitting, increasing the risk of  
 6 spreading COVID-19 among the protestors. *See Daniell Decl.* ¶¶ 20, 28, 53-54, 57. The concern  
 7 about the impact of the use of chemical agents on protesters during this pandemic led over 2,000  
 8 health professionals, led by doctors at the University of Washington, to sign a petition calling  
 9 attention to these dangers.<sup>27</sup>

10       These facts all show that Plaintiffs have proven a likelihood of success on their Fourth  
 11 Amendment claim.

12 **C. Plaintiffs Will Suffer Irreparable Harm Unless the Court Grants Their Motion**

13       Peaceful protests in Seattle, the surrounding areas, and across the country continue, and  
 14 more peaceful protests are planned throughout the week and beyond. Plaintiffs will suffer  
 15 immediate and irreparable injury if the City is permitted to continue to violate their civil rights.  
 16 “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably  
 17 constitutes irreparable injury.” *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012)  
 18 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Warsoldier v. Woodford*, 418 F.3d 989,  
 19 1001 (9th Cir. 2005) (A “colorable First Amendment claim” is “irreparable injury sufficient to  
 20 merit the grant of relief.”) (internal quotation marks omitted). Because constitutional violations  
 21 can often not be adequately remedied through damages, the Ninth Circuit does “not require a  
 22 strong showing of irreparable harm for constitutional injuries.” *Cuviello v. City of Vallejo*, 944  
 23 F.3d 816, 833 (9th Cir. 2019).

24  
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 27 Open letter advocating for an anti-racist public health response to demonstrations against systemic  
 injustice occurring during the COVID-19 pandemic, available at  
<https://drive.google.com/file/d/1Jyfn4Wd2i6bRi12ePghMHtX3ys1b7K1A/view> (last visited June 7, 2020).

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1       Irreparable injury has already occurred in the streets of Seattle through interrupted  
 2 speech, suppressed speech, deterred speech, and both physical and emotional injury caused by  
 3 excessive force by SPD on peaceful protestors. Peaceful protestors are leaving Seattle  
 4 demonstrations out of fear for their personal safety and for the physical injuries sustained at the  
 5 hands of SPD in exercising their First Amendment rights. Graham Decl. ¶¶ 9,16; Woldeab Decl.  
 6 ¶ 7. Worse, and demonstrating the need for a TRO, others are afraid to exercise their First  
 7 Amendment rights and peacefully demonstrate out of fear of SPD's use of excessive force.  
 8 Declaration of Elliot Grace Harvey ("Harvey Decl.") ¶¶ 2-3; Sakamoto Decl. ¶¶ 3-5; Lachman  
 9 Decl. ¶ 3.

10       While Defendants' actions against peaceful protesters on Seattle streets would constitute  
 11 irreparable harm even under normal circumstances, these times are anything but normal. Seattle  
 12 and communities across the globe are battling COVID-19, a novel respiratory illness. The use of  
 13 tear gas and pepper spray has the potential for severe consequences in light of COVID-19.  
 14 Daniell Decl. ¶¶ 20, 28, 53-54, 57. Exposure to tear gas and pepper spray cause coughing, eye  
 15 watering, and throat and nose. *Id.* ¶¶ 20, 28. These bodily reactions in turn make people more  
 16 susceptible to COVID-19. *Id.* ¶¶ 54, 57. Indeed, Public Health-Seattle & King County  
 17 specifically oppose "the use of tear gas & other respiratory irritants based on the potential to  
 18 increase COVID-19 spread."<sup>28</sup>

19       The so-called temporary "ban" on using tear gas by SPD announced by Mayor Durkan  
 20 and Chief Best is insufficient to prevent further constitutional violations against peaceful  
 21 protestors for several reasons. First, the "ban" is not mandatory or comprehensive; it is a  
 22 guideline that has already been breached without warrant or apparent consequences. Second, the  
 23 "ban" can be reversed at any time. Third, the "ban" only addresses tear gas, but not other  
 24 weapons employed by SPD such as pepper spray and flash-bang grenades. And fourth, the "ban"

25  
 26       

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<sup>28</sup> Alex Bartick, *Mayor Durkan Announces Temporary Ban on the Use of Tear Gas by SPD at Demonstrations*, KOMO News (June 5, 2020) (quoting Dr. Jeffrey Duchin of Public Health, Seattle and King County).

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1 did not prevent the constitutional violations that occurred at the intersection of 11th and Pine in  
 2 Capitol Hill. Multiple videos and eye-witness accounts confirm SPD used pepper spray and  
 3 flash-bang grenades against peaceful protestors. *See, e.g.*, Salisbury Decl. ¶ 3; Woldeab Decl.  
 4 ¶ 2; Ekenezar Decl. ¶ 4; Graham Decl. ¶¶ 2, 6; Kyashna-tochá Decl. ¶ 5. Finally, the City has  
 5 already broken its own so-called ban, using tear gas against protesters on Capitol Hill early  
 6 Monday morning. The “temporary ban” on tear gas apparently lasted only two days.

7 These injuries to Plaintiffs’ constitutional rights “unquestionably constitute[] irreparable  
 8 injury.” *See Otter*, 682 F.3d at 826.

9 **D. The Balance of Equities and Public Interest Weigh in Favor of an Injunction**

10 The Court “must balance the competing claims of injury and must consider the effect on  
 11 each party of the granting or withholding of the requested relief.” *Winter*, 555 U.S. at 24. Since  
 12 this case involves a government actor, the balance of equities factor merges with the fourth  
 13 factor, public interest. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).  
 14 This balance tilts sharply in Plaintiffs’ favor because the balance of equities and public interest  
 15 always favor “prevent[ing] the violation of a party’s constitutional rights.” *Melendres*, 695 F.3d  
 16 at 1002 (internal quotation marks omitted). “The fact that [Plaintiffs] have raised serious First  
 17 Amendment questions compels a finding that . . . the balance of hardships tips sharply in  
 18 [Plaintiffs’] favor.” *Cmt. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007)  
 19 (internal quotation marks omitted). Indeed, “it is always in the public interest to prevent the  
 20 violation of a party’s constitutional rights.” *Am. Beverage Ass’n v. City & Cty. of S.F.*, 916 F.3d  
 21 749, 758 (9th Cir. 2019) (quoting *Melendres*, 695 F.3d at 1002 (internal quotation marks  
 22 omitted)).

23 Plaintiffs have shown irreparable and concrete harm because SPD’s actions block their  
 24 ability to exercise their First Amendments rights, and violate their Fourth Amendment freedom  
 25 from excessive force. By contrast, the relief Plaintiffs seek does little, if any, harm to the City,  
 26

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1 which can and should pursue less restrictive and more narrowly tailored tactics. Indeed, Seattle's  
 2 Mayor recently conceded that the SPD has crossed the line:

3       Use of force must be rare, it must be necessary and it must be  
 4       proportional. Like everybody in our community, we know that  
 5       was not the case, not only this week but in cases before. I know  
 6       that safety was shattered for many by the images, sound and gas  
 7       more fitting of a war zone, and for that, I'm sorry.<sup>29</sup>

8       The Mayor's apology is significant because it acknowledges that SPD has overreacted  
 9       and concedes that SPD has more proportionate tactics that it can use to prevent violence,  
 10       safeguard property, and maintain order.

11       And finally, health experts have made clear that the use of chemical sprays—such as the  
 12       tear gas and OC spray that the SPD has indiscriminately used against peaceful demonstrators—  
 13       poses a significant risk of spreading COVID-19. Daniell Decl. ¶ 53. In fact, Dr. Jeffrey Duchin,  
 14       the head of King County Public Health, has denounced the use of “respiratory irritants” like tear  
 15       gas as a crowd control method because of the “potential to increase COVID-19 spread.”<sup>30</sup>  
 16       Granting this temporary restraining order is undeniably in the public’s interest.<sup>31</sup>

#### 17                                  IV. CONCLUSION

18       Plaintiffs respectfully request that the Court grant their request for preliminary relief, and  
 19       immediately enjoin the City from targeting peaceful protesters with blast balls, and canisters of  
 20       tear gas and pepper spray.

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 22  
 23       <sup>29</sup> Transcript: Mayor Durkan’s Remarks at Sunday, June 7 Press Conference, June 7, 2020,  
 24       <https://durkan.seattle.gov/2020/06/transcript-mayor-durkans-remarks-at-sunday-june-7-press-conference/>

25       <sup>30</sup> Alex Bartick, *Mayor Durkan Announces Temporary Ban on the Use of Tear Gas by SPD at*  
 26       *Demonstrations*, KOMO News (June 5, 2020) (quoting Dr. Jeffrey Duchin of Public Health, Seattle and King  
 27       County).

28       <sup>31</sup> Plaintiffs also request that the Court conclude no bond is necessary in connection with the TRO. Where,  
 29       as here, “there is no realistic likelihood of harm to the defendant from enjoining [its] conduct,” the court “may  
 30       dispense with the filing of a bond.” *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003).

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